(4)

No. 01-1325

Supreme Court, U.S.
FILED
APR 30 2002
CLERK

In the

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

HAROLD E. JOHNSON
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation

13 pp

QUESTION PRESENTED

Given that this Court has found the interest on clients' funds held in so-called IOLTA accounts (Interest on Lawyers' Trust Accounts) to be the property of the clients, does a regulatory scheme for funding state legal services by systematically confiscating this property violate the Fifth Amendment by imposing a categorical taking that is analogous to a physical invasion of private property, and by depriving the property owner of his right to exclude government from the uncompensated use of his private property?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

WHY THE WRIT SHOULD BE GRANTED 1

I. IN UPHOLDING A MANDATORY IOLTA PROGRAM, THE NINTH CIRCUIT CONTRADICTS THE RATIONALE THAT THIS COURT HAS EMPLOYED IN IDENTIFYING UNCONSTITUTIONAL PHYSICAL INVASIONS OF PRIVATE PROPERTY AND ILLEGAL INFRINGEMENTS ON THE RIGHT TO EXCLUDE 1

A. The Ruling Below Conflicts with This Court's *Loretto* Precedent, Which Is Applicable by Analogy to Show That the IOLTA Program Works an Unconstitutional Categorical Taking 2

B. The Decision Below Conflicts with Rulings of This Court That Forbid Uncompensated Physical Invasions, Because the IOLTA Program Invades a Definable Property Interest 4

C. The Ruling Below Conflicts with This Court's Precedents That Affirm a Property Owner's Fundamental Right to Exclude, and in So Doing the Ruling Below Raises Collateral Threats to Constitutional Rights 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641 (1890) 2

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 6

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 2

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 5

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 7

K mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988) 6

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 7

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 2-3

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 7

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1

Phillips v. Washington Legal Foundation, 521 U.S. 1117 (1997) 2

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 2

TABLE OF AUTHORITIES—Continued

	Page
Presault v. Interstate Commerce Commission, 494 U.S. 1 (1990)	6
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)	4
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)	1
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. ____, (2002)	5
Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835 (9th Cir. 2001)	1
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)	5-6
Rules	
Supreme Court Rule 10(c)	4, 6, 8
Miscellaneous	
Breemer, J. David, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221 (2000)	3, 6
2 William Blackstone, Commentaries	6
Webster's Third New International Dictionary 1188 (1993)	5
The Federalist No. 46, (James Madison) (Bantam Classic ed. 1982)	5
Kmiec, Douglas W., *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 Vand. L. Rev. 737, 759 (1999)	7

INTEREST OF AMICUS CURIAE

Amicus files this brief to assist in the consideration of important constitutional issues of property rights that are presented by this case. Pacific Legal Foundation (PLF) is a nonprofit organization headquartered in Sacramento, California, with an institutional commitment to a robust enforcement of the Fifth Amendment. For more than two decades PLF attorneys have been championing property rights in this Court. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

WHY THE WRIT SHOULD BE GRANTED

IN UPHOLDING A MANDATORY IOLTA PROGRAM, THE NINTH CIRCUIT CONTRADICTS THE RATIONALE THAT THIS COURT HAS EMPLOYED IN IDENTIFYING UNCONSTITUTIONAL PHYSICAL INVASIONS OF PRIVATE PROPERTY AND ILLEGAL INFRINGEMENTS ON THE RIGHT TO EXCLUDE

The Washington program at issue requires attorneys to deposit client funds that are nominal in amount into a pooled account whose interest is confiscated by the state. Petition for certiorari (Petition), Statement of the Case, at 2-6. As the Petition, at 7, notes, in upholding this IOLTA program the Ninth Circuit candidly admits that it diverges from the analysis employed by the Fifth Circuit when it found a similar program to be an unconstitutional taking. *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 857 (9th Cir. 2001). Moreover, the ruling contradicts this Court's teaching

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

that the uncompensated seizure of private property is a taking regardless of the property's intrinsic value. Petition at 19-20 (citing *Phillips v. Washington Legal Foundation*, 521 U.S. 1117 (1997), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The decision is also at odds with this Court's rulings that under certain circumstances equitable relief is available in the area of takings law. Petition at 26 (citing *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 659 (1890), and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978)).

In addition to these clear conflicts delineated in the Petition, Amicus wishes to draw attention to the contradiction between the ruling below and the rationale that has been employed by this Court in identifying physical invasions of private property and unconstitutional infringements on the right to exclude.

A. The Ruling Below Conflicts with This Court's *Loretto* Precedent, Which Is Applicable by Analogy to Show That the IOLTA Program Works an Unconstitutional Categorical Taking

This Court found a categorical taking where an ordinance required landlords to allow installation of cable TV in their apartment buildings, because the requirement amounted to "a permanent physical occupation authorized by government." *Loretto*, 458 U.S. at 426. The IOLTA program obviously does not invade real property; but it does authorize total state control over a private party's accrued earnings on a bank deposit—earnings that this Court has declared to be private property. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998). The rationale that this Court employed in finding a categorical taking by physical occupation in *Loretto* is equally applicable to the confiscation imposed by the IOLTA program. In *Loretto*, this Court found the following factors to be red flags signaling a physical occupation in violation of the Fifth Amendment:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. . . .

> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property . . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36 (citations omitted).

A commentator who has examined IOLTA programs, such as the case at bar, that confiscate clients' interest earnings, notes that *Loretto* "found the basis for its strict physical occupation takings standard in the extent to which occupation interfered with traditional property rights," and

> [m]andatory IOLTA programs interfere with the traditional property rights of clients to the same degree as a physical invasion. Specifically, when compelled to participate in the program, clients cannot assert possession over the interest generated from their principal, cannot control those funds, and are prevented from excluding the state from IOLTA interest. Accordingly, their ability to sell or devise their rights in IOLTA-generated interest is devoid of value. In sum, the government maintains complete control over the interest generated in IOLTA programs.

J. David Breemer, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221, 235-36 (2000).

In other words, the extent of the confiscation inflicted by IOLTA is comparable in a crucial sense to the infringement in *Loretto*. Analogizing between confiscation that amounts to a categorical taking (as in this case) and a physical occupation that also amounts to a categorical taking (as in *Loretto*) is a simple recognition that in both scenarios the owner's rights in

the property have been categorically denied. "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, *physical invasion, or regulation*," a taking in the Fifth Amendment sense has occurred. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis added).

The analogy between confiscation (as in this case) and occupation (as in *Loretto*) is rooted in the understanding that the Takings Clause protects the right to make use of what one owns. This Court has frequently observed that government actions that preclude an owner from making economically beneficial use of his property violate the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)) (the Fifth Amendment is violated by regulations that deny an owner economically viable use of his property). The IOLTA program appropriates to the state the beneficial use of depositers' private property—i.e., their accrued interest that is confiscated by the program. This infringement is comparable to a physical occupation in the sense that there is a categorical deprivation of the property owner's rights.

The ruling below thus conflicts with this Court's finding of a categorical taking in *Loretto*. Hence, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

B. The Decision Below Conflicts with Rulings of This Court That Forbid Uncompensated Physical Invasions, Because the IOLTA Program Invades a Definable Property Interest

As the foregoing section notes, this Court's rationale for finding a physical invasion in *Loretto* is applicable by analogy to the case at bar. But the *Loretto* prohibition on government invasion of private property—and other rulings to the same effect—are also applicable by more than analogy. A very real invasion is imposed by IOLTA, and the Ninth Circuit's refusal to recognize that fact is at odds with this Court's precedents. Even though a private party's money cannot be invaded in the

precise way that real property was occupied in *Loretto*, the term "invasion" is just as appropriate where private funds are commandeered, as happens under IOLTA. "Invade" is defined as "2: encroach, intrude or trespass upon," *Webster's Third New International Dictionary*, 1188 (1993). An invasion can be inflicted not only against real property, but against intangibles (e.g., The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to *invade the rights* of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 240 (James Madison) (Bantam Classic ed., 1982) (emphasis added)). IOLTA works an invasion of private property by categorically depriving the owner of the beneficial use of that property, as explained in the foregoing section.

This Court's logic in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), confirms that a mandatory IOLTA program such as the one at bar works an unconstitutional permanent invasion of private property. *Webb's* found unconstitutional a court's refusal to distribute to clients interest from their deposits held in a court registry in connection with an insolvency proceeding. *Id.* at 164. This Court found the appropriation of accrued interest invalid under a per se takings analysis—to be specific, a physical invasion theory.[2] Significantly, this Court found the

> appropriation of the beneficial use of the [accrued interest] analogous to . . . *United States v. Causby*, 328 U.S. 256 (1946). There the Court found a "taking" in the Government's use of air space above the claimant's land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. Causby emphasized that

---

[2] Likewise, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. ____ (2002), this Court found that categorical takings occur when there are "acquisitions of property for public use" and there is a "'classic taking' . . . [when] the government directly appropriates private property for its own use.'" *Id.* at 19, 20 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998)).

> Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 128, quoting from *Causby*, 328 U.S., at 262-63, n.7.

Webb's Fabulous Pharmacies, 449 U.S. at 164.

"*Causby* is . . . a quintessential physical occupation case, a fact which the Court later recognized in *Loretto*." Breemer, *supra,* at 240 (citations omitted). In other words, by drawing an analogy with *Causby*, this Court signaled that it found that the appropriation of accrued interest in *Webb's* worked an *unconstitutional invasion of private property.* Therefore, the case at hand, which also involves the appropriation of private property in the form of accrued interest, likewise amounts to an unconstitutional invasion of a definable private property interest. The Ninth Circuit's decision is at odds with this Court's prohibition on such invasions in *Causby*, *Webb's*, and *Loretto*. Hence, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

C. The Ruling Below Conflicts with This Court's Precedents That Affirm a Property Owner's Fundamental Right to Exclude, and in So Doing the Ruling Below Raises Collateral Threats to Constitutional Rights

Property is that "dominion one man claims and exercises over the external things of the world, *in total exclusion of the right of any other individual . . . .* " 2 William Blackstone, Commentaries *2 (emphasis added). Indeed, this Court has described the right to exclude as "[t]he hallmark of a protected property interest." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999). Nor is this right present only with *real* property. In *K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185-86 (1988), for instance, this Court asserted that private rights conferred by trademark law "are . . . rights of exclusion." When a state, by law, appropriates to itself the beneficial use of private property, it has abridged the owner's fundamental right to exclude. *See Presault v. Interstate Commerce Commission*, 494 U.S. 1, 24-

25 (1990) (O'Connor, J., concurring) (government's burdening of property in a way that interferes with the right to exclude implicates the Fifth Amendment).

Holders of deposits under the IOLTA program cannot exclude government from commandeering their accrued interest—their private property—for government's own purposes. They have thus been deprived of a right "universally held to be a fundamental element" of private property—a right that cannot be abridged by government without implicating the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Curtailing the right to exclude vitiates other constitutional rights. Indeed, the interconnection between the right to exclude and other basic freedoms offers a concrete illustration of a truth articulated by Justice Stewart:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

As one example, a party's First Amendment rights are imperiled when the party's right to exclude is denied. Private property protects its owners from being forced to contribute to the dissemination of opinions not their own. Private property "not only sustains political participation, but also the conscious choice to be insulated from politics." Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 Vand. L. Rev. 737, 759 (1999). If a property owner does not wish to endorse a particular message, his decision to exclude his property from use in a way that would support that message is itself a form of protected speech. This Court has recognized "the choice of a speaker not to propound a particular point of view," and has held that such a choice "is presumed to lie beyond government's power to control." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575

(1995). Although only the Fifth Amendment is directly at issue in the questions presented in this case, the indirect implications for other constitutional rights strengthens the argument for this Court to take review. If one cannot consciously decline to use one's property to host or subsidize a message, the absence of a right to exclude has negated the property owner's right to speak.

Because the decision below conflicts with this Court's consistent insistence that the right to exclude is a fundamental element of the property right, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the petition and reverse a ruling clearly in conflict with this Court's takings precedents.

DATED: April 26, 2002.

Respectfully submitted,

HAROLD E. JOHNSON
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation